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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as the Executors of the Estate of LOUIS A. GREEN, Deceased, and EVELYN GREEN, Individually, and as Stockholders of Kirby Lumber Corporation, Suing on Behalf of Themselves and for the Benefit of Said Corporation and for the Class of All Other Stockholders of Said Corporation Similarly Situated,

*Petitioners,*

—v.—

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Santa Fe Industries, Inc., Santa Fe Natural Resources, Inc., and Kirby Forest Industries, Inc., formerly known and designated herein as Kirby Lumber Corporation*, respectfully request that this Court deny

* Pursuant to Rule 28.1 of the Rules of this Court, respondents state that the ultimate parent of each of them is Santa Fe Southern Pacific Corporation. Respondents have no subsidiaries which are publicly traded.

the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. Respondents further request, in view of the frivolous nature of the petition, that appropriate damages be awarded pursuant to Rule 49.2 of the Rules of this Court.

## QUESTIONS PRESENTED

1. Where the substance of the petitioners' contention is only that the courts below incorrectly interpreted state law, is any genuine question presented under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)?

2. Where the Delaware Supreme Court, in overruling an earlier decision, provided a limited exception to the retroactivity of its ruling, in favor of plaintiffs who had relied on the earlier decision, and the claim of petitioners herein arose prior to the earlier decision, so that they could not have relied thereon, did the courts below correctly hold that petitioners were not within this exception to retroactivity?

3. Were the courts below correct in summarily dismissing petitioners' claims under a New York State statute where the New York courts had previously rejected petitioners' interpretation of that statute?

## STATEMENT OF THE CASE

The 1974 transaction which gave rise to the present action is fully described in this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). Briefly, petitioners in 1974 were stockholders of Kirby Lumber Corporation ("Kirby"), a Delaware corporation, 95% of

the stock of which was owned by respondent Santa Fe Natural Resources, Inc. ("Resources"). Resources in turn was a wholly owned subsidiary of respondent Santa Fe Industries, Inc. ("Santa Fe"). Section 253 of the Delaware Corporation Law, commonly referred to as the "Short Form Merger Statute", provides an expedited procedure through which a parent corporation owning 90% or more of the stock of a subsidiary can eliminate the minority interest and tender cash payments to the former minority stockholders. Stockholders dissatisfied with the amount of the cash payment offered may seek appraisal in the Court of Chancery under Section 262 of the Delaware Corporation Law.

On July 31, 1974, Resources effected a merger between Kirby and a subsidiary of Resources which had been formed for that purpose, the effect of which was to eliminate the minority stock interest in Kirby. The former minority stockholders were furnished with an information statement which described the transaction, and informed them that they could either accept a cash payment of $150 per share, or invoke their right of appraisal in the Delaware courts. Petitioners originally indicated their intention to seek appraisal, but subsequently withdrew their request, and instead commenced the present action in the United States District Court for the Southern District of New York. Although not alleging any misrepresentations or failures to disclose, petitioners in their original complaint sought to invoke Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, urging that these provisions were violated by the alleged unfairness of the merger terms, even in the absence of any manipulation or deception. This Court rejected petitioners' contention, and held that they had failed to state a claim under the federal securities laws.

After this Court upheld the dismissal of petitioners' purported federal securities claims, petitioners amended their pleadings to assert state law claims exclusively, invoking the jurisdiction of the District Court solely on the basis of diversity of citizenship. The Second Amended Complaint, the dismissal of which is here involved, contained two purported claims, one for alleged breach of fiduciary duty under Delaware common law, and one under New York General Business Law Section 352-c, commonly known as the Martin Act.

## ARGUMENT

### Reasons Why the Writ Should Be Denied

### 1. The Petition Asks this Court to Review a Narrow Factual Issue with No General Applicability

The issue which petitioners seek to raise in this Court is an extremely narrow question, relating to the application of state law to a complex and probably unique set of facts.

As this Court noted in its earlier decision in this action, 430 U.S. at 479 n.16, prior to 1977 the law of Delaware was clear that the sole remedy for a dissatisfied stockholder in a Delaware short form merger was a statutory appraisal proceeding under Section 262 of the Delaware Corporation Law. In 1977, in *Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. Sup. 1977), the Delaware Supreme Court overruled its earlier decisions on this point, and held that under some circumstances an action for breach of fiduciary duty could be brought in lieu of appraisal. In 1983, in *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (Del. Sup. 1983), the Delaware Supreme Court again reversed its position, and overruled *Singer*, holding that the statu-

tory appraisal was once again the exclusive remedy of a dissatisfied stockholder.

In so doing, the Court in *Weinberger* noted that "there are other litigants, like the plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved" (457 A.2d at 714). The opinion in *Weinberger* clearly indicated that the rule there announced is not retroactive as to persons who, like the plaintiff in that case,[1] had relied on the *Singer* decision in deciding to forego appraisal. The only point of dispute in the present case was whether the exemption from retroactive effect should also apply to plaintiffs, who were in the virtually unique position of still litigating a pre-1977 merger at the time the *Weinberger* decision was announced.

The record reveals that no such cases exist, other than the present action, a duplicative action brought by petitioners in the New York state court,[2] and one case pending in the Delaware Court of Chancery, which apparently was abandoned several years ago. Thus, the resolution of the issues which petitioners seek to raise would have no application beyond their own case. Under these circumstances, petitioners can hardly assert in good faith that the present case presents "special and important reasons" for review, as required by Rule 17 of the Rules of this Court.

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1 Weinberger had filed a complaint which closely tracked the complaint in *Singer*. *See Weinberger* v. *UOP, Inc.*, 426 A.2d 1333, 1342 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. Sup. 1983).

2 Petitioners' state court action is currently the subject of a motion for summary judgment, on the basis *inter alia* of *res judicata* and collateral estoppel.

## 2. The Purported Issues as to Which Petitioners Seek Review Were Never Raised in the Courts Below, and Do Not Present Any Genuine Federal Question

In 1983, respondents moved in the District Court for summary judgment, asserting that the decision of the Delaware Supreme Court in *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (1983) mandated the dismissal of the petitioners' claim under Delaware law. At the same time, respondents also sought summary judgment dismissing the claim under the New York Martin Act. Both sides agreed that the *Weinberger* decision was the applicable Delaware authority, but disagreed sharply as to how it should be interpreted. The District Court, after a careful analysis of the *Weinberger* decision and other Delaware cases, concluded that if faced with this case the Delaware Supreme Court would now dismiss petitioners' claim, and that otherwise petitioners "would reap a windfall that the Delaware Supreme Court could not have intended" (A 13, 576 F. Supp. at 271). At the same time the District Court stated that it was unnecessary to discuss petitioners' claim under the Martin Act (A 7,576 F. Supp. at 270), which was clearly and completely precluded by the applicable New York State decisions under that statute (see pages 9-11, *infra*).

In the Second Circuit, petitioners argued that the decision of the District Court was incorrect under the applicable state law. They did *not* argue, or even remotely suggest, that the District Court had refused to follow state law, or had somehow acted in contravention of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). (A copy of the statement of issues from petitioners' brief in the Second Circuit is annexed to this brief as Appendix A.) The only issues which petitioners sought to raise in the Court of

Appeals related to the correctness of the District Court's interpretation of the applicable state law, and the correctness of that Court's earlier denial of class certification. The "Questions Presented" in the instant petition are sought to be raised for the first time in this Court, and that fact alone would warrant denial of the petition. *E.g*, *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even apart from the fact that it was never raised below, the contrived *Erie* "issue" is without substance. The entire basis of the lower courts' decision was their analysis of *Weinberger*, in an effort to ascertain the intention of the Delaware Supreme Court. Petitioners' contentions actually amount to no more than an argument that the courts below interpreted the state law incorrectly. Such a claim presents no issue meriting review by this Court.

### 3. The Result Reached by the Courts Below Was Clearly Correct on the Merits

#### A. *As to the Claim under Delaware Common Law*

As noted, the decisive issue in the lower courts as to the continued viability of petitioners' claim under Delaware law was whether the Delaware Supreme Court would apply *Weinberger* retroactively to persons who, like petitioners, obviously had not relied on the 1977 decision in *Singer*. After a careful review of the Delaware authorities, the District Court concluded that the Delaware Supreme Court, if it were deciding petitioners' case, would apply the *Weinberger* holding to them. Thus, the District Judge stated (576 F. Supp. at 271, A 12-13):

> Defendants argue that the *Weinberger* court, in limiting its holding retroactively, intended to assist

> those plaintiffs who brought an action between *Singer*, decided in 1977, and *Weinberger*. Thus, defendants contend that the *Green* plaintiffs have no excuse for not pursuing an appraisal remedy because their action was instituted at a time when *Singer* had not yet been decided, and therefore plaintiffs could not possibly have relied on *Singer*. Defendants' argument is persuasive. Although the *Weinberger* court appeared to limit the reach of its holding to all mergers effected before 1983, the policy considerations behind the court's decision to allow certain plaintiffs to continue to seek remedies other than appraisal would not be promoted by a blind application of the court's provision for retroactive relief. Further, plaintiffs would reap a windfall that the Delaware Supreme Court could not have intended.

A unanimous Court of Appeals summarily affirmed, "substantially for the reasons set forth by Judge Duffy below in his memorandum and order," (A 2), and rehearing was denied (A 19-20).

In attacking the correctness of this holding, petitioners urge in effect that the courts below should not have considered the policy considerations behind the state court's decision, but rather should have rigidly and literally applied the state court's reference to "any case challenging a cash-out merger, the effective date of which is on or before February, 1983" to petitioners. This contention, however, is without merit. In its task of "predicting a state court's position" (1A Moore's Federal Practice, 0.309[2] (2d Ed. 1983) at 3117), a federal court in a diversity case should seek to give effect to the policies set forth in the state courts' previous decisions. *E.g.*,

*Stafford* v. *International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981); *East Troy* v. *Soo Line R. Co.*, 653 F.2d 1123, 1129 (7th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981); *Medvecz* v. *Choi*, 569 F.2d 1221, 1226 n.14 (3d Cir. 1977). Thus, a federal court in a diversity action should not automatically give literal application to a state courts' language in a case involving significantly different facts. *Ohio Casualty Insurance Co.* v. *Smit*, 297 F.2d 265, 267 (7th Cir. 1962). Further, this is the approach taken by the Delaware Supreme Court in applying the doctrine of *stare decisis* to its own previous decisions. *Bovay* v. *H.M. Byllesby & Co.*, 38 A.2d 808, 813 (Del. Sup. 1944) ("The language of the Court is to be interpreted in light of the situation presented.").

The courts below correctly interpreted and followed the policies behind the applicable state court decision, and petitioners have no valid basis for seeking review in this Court.

B. *As to the Purported Claim Under the Martin Act*

Petitioners complain (pp. 25-26) that the District Court summarily dismissed, without discussion, their state securities law claim under the Martin Act, New York General Business Law § 352-c. Petitioners omit to mention that their Martin Act claim is specifically and completely barred by the applicable New York authorities.

Petitioners did not, and could not, make any allegations of deception and reliance, which are essential elements of any private damage action under the Martin Act. Their complaint alleged that certain items were omitted from the information statement furnished to minority stockholders "for the purpose of lulling the

minority stockholders into not seeking appraisal or other judicial relief" (189 a, ¶ 15(c)). Petitioners, however, were obviously not "lulled", since they responded to the information statement by immediately "seeking appraisal or other judicial relief." This fact was fatal to petitioners' claim under the New York statute. As was held in *Halle & Stieglitz* v. *Kolen*, [1978-1981 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,435, at p. 68, 435 (Sup. Ct. N.Y. Co. 1978), *aff'd on the opinion below*, 71 A.D.2d 554, 418 N.Y.S.2d 552 (1st Dep't 1979):

> In order to state a cause of action for violation of section 352-c, a private plaintiff must allege the following elements: deception, materiality, reliance and proximate damage [*Drasner v. Thompson McKinnon Securities, Inc.*, 433 F. Supp. 485, 503 (SDNY 1977)].

*Accord*, *Shivers* v. *Amerco*, 670 F.2d 826, 832 (9th Cir. 1982) (applying New York law).

In the courts below, petitioners nevertheless urged that the alleged unfairness of the merger terms gave rise to a damage claim under the Martin Act even in the absence of deception and reliance, citing *People* v. *Concord Fabrics, Inc.*, 83 Misc. 2d 120 (Sup. Ct. N.Y. Co.), *affd.* 50 A.D.2d 787, 377 N.Y.S.2d 84 (1st Dep't 1975). However, the New York courts had already rejected a similar argument in *Halle & Stieglitz*, *supra* [1978-1981 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,435 at p. 68,436:

> The case of *People v. Concord Fabrics, Inc.*, 83 Misc. 2d 120, aff'd 50 A.D.2d 787, relied upon heavily by plaintiffs, is inapposite, inasmuch as it involved a proceeding brought not by individuals but by the attorney-general for injunctive relief.

Petitioners' Martin Act claim fully deserved the short shrift it received in the courts below. To include it in a petition for certiorari is an imposition upon this Court.

**4. Damages Should be Awarded Against Petitioners Under Rule 49.2 for Filing a Frivolous Petition**

The instant petition is completely devoid of merit. It asks this Court to review issues which involve state law exclusively. It seeks review, not even as to a general rule of state law, but as to the application of such a rule to a complex and probably unique set of facts, which is unlikely ever to recur. In the Questions Presented, it seeks to raise contrived and specious federal "issues" which were never raised in the courts below. It asks this Court to review the summary dismissal by the lower courts of an *Erie* claim under a New York State statute, without disclosing that the New York decisional law interpreting that statute is clearly adverse to petitioners' position. In view of the foregoing, respondents respectfully suggest that this is an appropriate case for the imposition of damages under Rule 49.2 of the Rules of this Court.

## CONCLUSION

For all the reasons assigned, the petition should be denied. In addition, respondents respectfully suggest that appropriate damages should be awarded against petitioners for filing a frivolous petition, in violation of Rule 49.2.

Dated: September 21, 19841

Respectfully submitted,

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## Appendix A

[Statement of Issues from Petitioners' Brief in the Second Circuit]

1

## BRIEF FOR PLAINTIFFS-APPELLANTS

### Preliminary Statement

Appeal from order of Hon. Kevin T. Duffy, District Judge, granting summary judgment dismissing the complaint and for review of orders denying class certification. Opinion on summary judgment in ____ F. Supp. ____, is reproduced in Appendix (386a);[3] opinions and orders denying the two motions for certification of a class action set forth respectively at 204a and 267a.

### The Issues

1. Whether the complaint states a cause of action for breach of fiduciary obligation cognizable in equity, under the decision of the Supreme Court of Delaware in *Weinbergr v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

2. Whether the complaint states a cause of action under the Martin Act (N.Y. Gen. Bus. L., Section 352-c).

3. Whether the action should be certified as a class action under Rule 23 where there were no valid grounds in fact or in law for the denial.

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3 Reference to the Appendix is by "a" and page number, such as, " . . . a".